GOLDEN PALMOLINA SDN BHD A

v.

LAI YANG CHEE & ANOR

HIGH COURT MALAYA, SHAH ALAM B
ROSNAINI SAUB JC
[CIVIL SUIT NO: 22-1636-2006]
14 MARCH 2007

CIVIL PROCEDURE: *Discovery - Order for - Application seeking order for discovery of information - Principles applicable - Identification of wrongdoers - Whether application for discovery order based on Norwich Pharmacal principle misconceived and without merits* C

The plaintiff, who was claiming against the first and second defendant for secret payments they had received from various third parties while they were in the employment of the plaintiff as employee and director respectively, sought an order for discovery of information from one Able Perfect Sdn Bhd ('Able Perfect') in respect of such secret payments it had made to the director and/or employee of the plaintiff. The plaintiff contended that it required such information first from Able Perfect in order to determine whether any wrongdoings had been committed and, if so, to identify the wrongdoers. It was the plaintiff's submission that the wrongdoing referred to herein was the payment of commissions or such other payments made by Able Perfect to the plaintiff's director and/or employee without the knowledge of the plaintiff, and that those who received such payments had clearly committed a tortuous act. D E F

Held (dismissing the application): G

(1) In the present case, the identities of the wrongdoers had already been identified and were known to the plaintiff and, indeed, they had been cited as the first and second defendants. Having perused the endorsement of the claim in the plaintiff's writ of summons and affidavit in support, it was obvious that the persons accused of committing the wrongdoing were the defendants and no other. Therefore, this court could not agree with the plaintiff's submission that it could only speculate on the identity of the wrongdoers. On the contrary, the fact that the plaintiff had filed this action H I

against the two defendants did not support that contention. Thus, the plaintiff's application for the discovery order based on the Norwich Pharmacal principle was misconceived and without merits. The plaintiff must and should call a witness from Able Perfect in the normal way to prove its case against the defendants. There was another reason why the plaintiff's application was misconceived. The plaintiff had categorically stated that Able Perfect had no objection to giving whatever information required. In fact, it had been submitted that Able Perfect had no objection to the plaintiff's application. If so, then the plaintiff would have no difficulties in getting someone from Able Perfect to give evidence at the trial of the action. Hence, there was no necessity for the plaintiff to make this application and there was no justifiable ground for this court to exercise its discretion to grant the order sought. (paras 10 & 12)

Case(s) referred to:

First Malaysia Finance Berhad v. Dato' Mohd Fathi Hj Ahmad [1993] 3 CLJ 329 SC ***(refd)***

Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor [1997] 3 CLJ 197 CA ***(dist)***

Norwich Pharmacal Co & Ors v. Commissioners of Customs and Excise [1973] 2 All ER 943 ***(refd)***

Teoh Peng Phe v. Wan & Co [2001] 5 CLJ 222 HC ***(dist)***

For the plaintiff - T Kumar; M/s Thurairaj T Kumar & Assoc

Reported by Suresh Nathan

JUDGMENT

Rosnaini Saub, JC

[1] By the writ of summons filed herein endorsed with its claim, the plaintiff claims against the 1st and 2nd defendants for secret payments, including commissions, they had received from various third parties while they were in the employment of the plaintiff as employee and director, respectively.

[2] By this *ex parte* summons in chambers in encl. 2, the plaintiff is seeking an order for discovery of information from Able Perfect Sdn Bhd in respect of such secret payment it has made to the directors and/or employees of the plaintiff. It is contended by the

plaintiff that the plaintiff requires such information first from Able Perfect Sdn Bhd in order to determine whether any wrongdoings have been committed and if so to identify the wrongdoers. It is the plaintiff's contention that the wrongdoing referred to herein was the payment of commissions or such other payments made by Able Perfect Sdn Bhd to the plaintiff's directors and/or employees without the knowledge of the plaintiff. The directors and/or employees who received such payments are clearly in law have committed a tortious act.

[3] In essence what the plaintiff is seeking in encl. 2 is what have become known as the Norwich Pharmacal order as propounded in the House of Lords' case of *Norwich Pharmacal Co & Ors v. Commissioners of Customs and Excise* [1973] 2 All ER 943; (also at [1974] AC 133). Basically the principle propounded by the said case provides for the exception to the general rule that discovery to find the identity of the wrongdoer is available only against anyone with whom the plaintiff has a cause of action in relation to the same wrong and it is not available against a person who has no other connection with the wrong other than he was a spectator or has some document relating to it in his possession.

[4] In the *Norwich Pharmacal*'s case *(supra)*, Norwich Pharmacal owned a patent of a certain chemical. Someone unknown to Norwich Pharmacal has been importing into the country the said chemical in violation of Norwich Pharmacal's patent's right. Such importation could not have occurred unless the Commissioners of Custom and Excise had cleared the goods, ie, the chemicals, for entry into the country. However, the Commissioners of Customs and Excise, in doing so, had committed no crime or wrong as their function being simply to ensure taxes were collected on the imported goods. The Customs refused to disclose the names of the importers that have violated Norwich Phamarcal's patent rights. Norwich Pharmacal then brought an action against the Commissioners of Customs and Excise and the sole relief eventually sought by Norwich Pharmacal was for the Commissioners of Customs and Excise to disclose the names of the importers so that they (the importers) can be identified and Norwich Pharmacal could initiate action against those importers.

[5] All five members of the House of Lords unanimously held that such action for discovery existed but subject to certain limitations. Therefore, Norwich Pharmacal succeeded in compelling the Commissioners of Customs and Excise to reveal the names of the importers of the patented chemicals. The House of Lords was of the opinion that a person through no fault of his own who inadvertently involved in a commission of a wrong committed by others has a duty to assist the person who was wronged to give information on the identity of the wrongdoer. Lord Reid succinctly put it as follows:

> … if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

[6] In *First Malaysia Finance Berhad v. Dato' Mohd Fathi Bin Haji Ahmad* [1993] 3 CLJ 329, Edgar Joseph Jr SCJ (as he was then) in delivering the judgment of the then Supreme Court accepted the principle of the *Norwich Pharmacal* case *(supra)* and explained the exception to that general rule of discovery as follows at p. 334:

> To the general rule aforesaid, there is, however, an exception exemplified by the *Norwich Pharmacal* case; the exception being that if, through no fault of his own, a person gets mixed up in the tortious acts of others so as to facilitate their wrongdoing, whilst he may incur no personal liability, yet is under a legal duty to assist the person who has been wronged by giving him full information and in making disclosure of the identity of the wrongdoers.

[7] Thus, even though the Rules of the High Court do not have any specific provisions for the plaintiff to apply for an order of discovery as prayed for in encl. 2, the plaintiff can nevertheless do so by virtue of the *Norwich Pharmacal* principle which has been approved by the Supreme Court in *First Malaysia Finance*'s case *(supra)*. And it seems that it is settled law that the plaintiff can do so by either naming Able Perfect Sdn Bhd as defendant or by

way of summons in chambers. In *First Malaysia Finance* case *(supra)* the application was made by making the party from which that the discovery was required as the defendant. In *Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor* [1997] 3 CLJ 197 the Court of Appeal seemed to have approved such application being made by *ex parte* summons in chambers.

[8] However, the application of the *Norwich Pharmacal*'s principle has limitations and must be within the perimeter of the decision in *First Malaysia Finance*'s case. The first pre-requisite is that the identity of the wrongdoer is not known to the plaintiff and can only be discovered from the oral evidence or information sought from the third party. As Kang Hwee Gee, J in *Teoh Peng Phe v. Wan & Co* [2001] 5 CLJ 222 said at p 240 para c:

> I would therefore have to agree entirely with counsel's submission that Norwich Phamarcal would have to be confined to the narrow ratio stated therein. The decision in First Malaysia Finance is unequivocal – **where the identity of the wrongdoers had already been known, an order of discovery is unavailable.** (emphasis added)

[9] It is pertinent to note that in *First Malaysia Finance*'s case *(supra)*, Edgar Joseph Jr, SCJ at p. 336 of the law report was explicitly clear on this point when he said:

> Unlike the *Pharmacal* case, the present case was one where the identity of those who alleged by the plaintiff to have committed the wrongful acts *vis-à-vis* the plaintiff were known to the plaintiff and, indeed they had been cited as the first to the fourth defendants in the action. ... So, on this ground alone there was no question of the fifth defendant, being such a 'person' within the meaning of the exception.

[10] Coming to our present case, I think the identity of the wrongdoers has already been identified and is known to the plaintiff and indeed they have been cited as the first and second defendants. Having perused the endorsement of the claim in the plaintiff's writ of summons and the plaintiff's affidavit in support, it was obvious that the persons accused of committing the wrongdoing were the defendants and no other person. I am therefore unable to agree with the plaintiff counsel when he said in his submission that the plaintiff can only speculate on the identity of the wrongdoers. On the contrary, the fact that the

plaintiff has filed this action against the two defendants does not support the learned counsel's contention. I therefore of the opinion that the plaintiff's application as per encl. 2 for the discovery order based on the *Norwich Pharmacal*'s principle is misconceived and without merits. In our present case, the plaintiff must and should call a witness from Able Perfect Sdn Bhd in the normal way to prove its case against the defendants.

[11] The plaintiff's counsel seems to equate our present case to that of *Teoh Peng Phe*'s case *(supra)*. However, the facts and circumstances here are very different from *Teoh Peng Phe*'s case. In that case, the wrongdoer could be any of the plaintiff's directors and therefore the exact identity of the wrongdoer among those directors was not known. In our present case, however, it was clear that the alleged wrongdoers are the two defendants and no other persons.

[12] There is another reason why I consider that the plaintiff's application is misconceived. The plaintiff and its counsel has categorically state that Able Perfect Sdn Bhd has no objection to giving whatever information required. In fact it has been submitted that Able Perfect Sdn Bhd has no objection to the plaintiff's application. If so, then I am of the opinion that the plaintiff will have no difficulties in getting someone from Able Perfect Sdn Bhd to give evidence at the trial of the action. Therefore there is no necessity for the plaintiff to make this application and there is no justifiable ground for this court to exercise its discretion to grant the order sought. As per Edgar Joseph Jr, SCJ in *First Malaysia Finance*'s case *(supra)*, a *Norwich Pharmacal* order being an equitable remedy will not be granted as of right even when the requirements for it are satisfied and, so, the court has a discretion as to whether to grant or refuse it.

[13] Therefore, this case again differs from *Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor (supra)*. That case involved a dispute in a law firm wherein the appellant parted company with the respondents. When the appellant continued to interfere with the affairs of the respondents' new law firm, the respondent applied and obtained an interlocutory injunction restraining the appellant from acting in a manner detrimental to the said law firm. Subsequently, a client of the law firm, one Dato Elli, who was once attended by the appellant, wrote a letter to the respondents stating that 'after due consultation with the person in charge' the

amount owing to the respondents in respect of a bill for conveyancing matters have been reduced to only RM58,000. The respondents have successfully obtained an order for oral examination to be taken from Dato Elli for the purpose of finding out the identity of who was that 'person in charge' that Dato Elli mentioned in his letter. It can be seen from the judgment of Gopal Sri Ram, JCA in that case that despite the request of the respondents, Dato Elli was uncooperative and had refused to reveal the identity of the 'person in charge' even though he clearly knew the same. His Lordship clearly thought that the *Norwich Pharmacal* principle was applicable in the circumstance of that case. In our present case there is no evidence of such non-cooperation from Able Perfect Sdn Bhd.

[14] In my opinion, the information which the plaintiff sought to obtain from Able Perfect Sdn Bhd is not to identify the wrongdoers (which it has already identified and has been cited as defendants herein) but rather to obtain evidence to prove the defendants' wrongdoing. The burden is on the plaintiff to prove the defendants' tortious act at the trial of the action by calling a witness from Able Perfect Sdn Bhd. The *Norwich Pharmacal* principle is clearly not applicable to the present circumstances of this case.

[15] In the premises, the plaintiff's application as per encl. 2 is misconceived and is hereby dismissed. As this is an *ex parte* application, I make no order as to costs.